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No. 80-534

IN THE

Supreme Court of the United States

October Term, 1980

JOY ADLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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Introduction

This is a brief in behalf of respondent in opposition to a petition for a writ of *certiorari* to the Court of Appeals of the State of New York.

On February 14, 1977, petitioner was charged with the crimes of criminal possession of a controlled substance in the third degree (2 counts), criminal possession of a con-

trolled substance in the seventh degree and unlawful possession of marijuana under Indictment No. 8311 of 1977. On or about May 16, 1978, the Hon. Richard A. Brown, a Justice of the Supreme Court of the State of New York, ordered the suppression of certain evidence seized in connection with this case [see petitioner's appendix, p. 22A]. The District Attorney appealed the adverse portion of Mr. Justice Brown's order to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. On May 7, 1979, the Appellate Division modified Mr. Justice Brown's order by denying the motion to suppress in all respects [petitioner's appendix, p. 32A]. At this juncture petitioner had the option of either proceeding to trial or disposition of the case or appealing to the Court of Appeals. Petitioner chose to appeal the case to the Court of Appeals and on or about July 3, 1980, the Court of Appeals of the State of New York affirmed the order of the Appellate Division [see petitioner's appendix, pp. 4A *et seq.*]. The instant petition for *certiorari* is from that order and opinion.

Opinion Below

The opinion of the New York Court of Appeals is reported at 50 N.Y.2d 730 (1980).

Jurisdiction

The jurisdiction of this Court is invoked by petitioner under Article 3, Sec. 2, Clause 2 of the United States Constitution; *Martin* v. *Hunter,* 14 U.S. 304; *Cohens* v. *Virginia,* 19 U.S. 264; *Abelman* v. *Booth,* 62 U.S. 506.

Statutes Involved

The Constitution of the United States, Amendment Four.

Statement of Facts

The statement of facts, as set forth in the opinion of the Hon. Lawrence J. Cooke, Chief Judge of the New York State Court of Appeals, in the opinion of the court below, as set forth in petitioner's appendix, p. 4A *et seq.*, is adopted herein by respondent.

POINT ONE

This Court is without jurisdiction to grant a petition for *certiorari* at this stage of the litigation.

Although petitioner does not rely upon it to allege jurisdiction, it is clear that the procedural vehicle by which he must sustain jurisdiction is found at 28 U.S.C. §1257(3), which reads as follows:

> *Final Judgments* or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
> . . .
> (3) by writ of *certiorari*, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . .

Thus, in order for the petitioner to invoke the jurisdiction of this Court, she must overcome the procedural hurdle of "finality of judgment." Given the posture of the litiga-

tion that has thus far proceeded in this case, it is respectfully submitted that petitioner will be unable to overcome this hurdle.

> The final judgment in a criminal proceeding is the sentence. *Berman* v. *United States,* 302 U.S. 211; *Parr* v. *United States,* 351 U.S. 513, 518. Hence a state court judgment which merely overrules a plea in bar, or a demurrer to an indictment, or denies a preliminary hearing, or disposes of a motion relating to admission of evidence lacks the finality necessary to support review by the Supreme Court. See *Eastman* v. *Ohio,* 299 U.S. 505 (plea or res judicata); *Polakow's Realty Experts, Inc.* v. *Alabama,* 319 U.S. 750 (demurrer); *Arcenaux* v. *Louisiana,* 376 U.S. 336 (preliminary hearing); *Chapman* v. *California,* 405 U.S. 1020 (pretrial motion to suppress evidence and to return seized property); and see *Wilson* v. *Schnettler,* 365 U.S. 381, 384-385 (preliminary motion to suppress use of evidence at trial). Stern & Gressman, *Supreme Court Practice,* 5th Ed., page 195.

Chapman v. *California, supra,* is, in its procedural history, remarkably similar to the case at bar. Both cases involved interlocutory appeals from the order of suppression in the trial court. In both cases, the highest court in the state ultimately denied the motion to suppress. Chapman's petition was denied by this Court on the specific ground that the state court decision was not final. Respondent submits that the *Chapman* case is controlling.

It is also worth noting that the dissenters in the *Chapman* opinion, who would have granted *ceriorari,* focused primarily on the fact that the case involved not only the

Fourth Amendment but the First Amendment as well. As Mr. Justice Douglas wrote,

> *Mills* v. *Alabama* . . . (384 U.S. 214) teaches that where First Amendment rights are involved, compliance with procedural formalities before allowing their vindication in this Court is not necessary unless those procedures are meaningful.
>
> I will follow *Mills* and grant the petition for a writ of *certiorari* and put the case down for argument. (Citation added.)

It is clear that a prime motivation for Mr. Justice Douglas' dissent from the *Chapman* opinion focused upon the First Amendment ramifications of the case. The case at bar, having no such First Amendment ramifications, presents an even stronger one to justify the conclusion that the petitioner's claim of jurisdiction must fail because of the absence of "finality of judgment."

Cox Broadcasting Corp. v. *Cohn,* 420 U.S. 469 (1975) is of no help to petitioner. In accepting jurisdiction to review that judgment, the Court stated,

> The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts . . . [E]ven if appellants [the press] prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision on the First Amendment claim until after trial . . . will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and

a statute the constitutionality of which is in serious doubt (420 U.S. at 485-486).

It is clear that much remains to be determined in connection with this case. Petitioner may demand a full trial on the issue of guilt or innocence. It cannot be said that the denial of a motion to suppress is in any way dispositive of that question. Accordingly, the instant petition should be denied as being jurisdictionally defective.

POINT TWO

The determination of the court below is so clearly correct that no further review is necessary.

Because we are persuaded that the jurisdictional impediment is so clearly controlling, respondent will merely rely upon the opinion of the majority in the Court of Appeals as to the merits of petitioner's case. We would simply add the following brief comment.

Should this Court adopt the notion that *Walter* v. *United States* (—— U.S. ——, 65 L.Ed.2d 410) prohibits the kind of police activity engaged in herein, almost no physical evidence voluntarily turned over to the police by concerned citizens could be utilized by the police in the absence of a warrant. All drugs must be submitted to laboratory tests, all weapons tested for operability, and all stolen property must ultimately be returned to its rightful owner. In short, to apply *Walter, supra,* to this case would substantially eliminate the long-standing doctrine that the exclusionary rule is inapplicable to evidence obtained by private citizens. *Burdeau* v. *McDowell,* 256 U.S. 465 (1921).

Conclusion

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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